Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1696

WILLIAM KAZONIS,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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TABLE OF CONTENTS

	Page
Opinion of the Court Below	1
Jurisdiction	1
Questions Presented	2
Federal Statutes Involved	2
Statement of the Case	4
Statement of Facts	5
Argument for Allowance of the Writ	5
I. Is the Prosecution Defective of an Indictment That Charged the Defendant in a Conspiracy Count With Having Conspired With "... Various Other Persons Whose Names Are Known and Unknown to the Grand Jury". The Fundamental Requirement of an Indictment Is To Furnish an Accused With Such Description of the Charge so as To Enable Him (1) To Prepare His Defense, (2) To Protect Him Against Double Jeopardy, and (3) To Inform the Court of the Facts Alleged so That It May Decide if They Are Sufficient in Law To Support a Conviction	5
II. The Danger Inherent in Combining in One Prosecution a Conspiracy Count With Substantive Counts That Essentially Are Offenses No More Than the objects of the Conspiracy	7
III. Should a Mistrial Have Been Granted After Jurors Had Read a Newspaper Article in the Jury Room That Associated the Defendant With Well Publicized Organized Crime Figures. The News Source of the Article Carried into the Jury Room Had Been a Special United States Attorney Who Had Presented the Instant Case to the Grand Jury Returning This Indictment	7

Page

Conclusion 12
Appendix 13

TABLE OF CITATIONS

Cases

Anderson v. *United States*, 262 F.2d 764 (8th Cir. 1959) 5
Gorin v. *United States*, 313 F.2d 641 (1st Cir. 1963) ... 9
Hagner v. *United States*, 285 U.S. 427, 52 S. Ct. 417, 76 L. Ed. 861 (1932) 5
Holt v. *United States*, 218 U.S. 245, 31 S. Ct. 2, 54 L. Ed. 1021 9
Marshall v. *United States*, 360 U.S. 310, 79 S. Ct. 1171 9
Rogers v. *United States*, 340 U.S. 367, 71 S. Ct. 438 (1950) 6
Russell v. *United States*, 369 U.S. 749, 82 S. Ct. 1038, 2 L. Ed. 240 (1960) 5
United States v. *Addonizio*, 451 F. 2d 764 (3rd Cir. 1972) 5
United States v. *Concepcion Cueto*, 515 F.2d 160 (1975) 10, 11
United States v. *Falco*, 496 F.2d 1359 (1974) 6
United States v. *Green*, 421 F.2d 1237 (2nd Cir. 1970) 5
United States v. *Lamont*, 236 F.2d 312 (2nd Cir. 1959) 6
United States v. *Schaefer*, 510 F.2d 1307 (8th Cir. 1975) 33
United States v. *Tomasetta*, 429 F.2d 978 (1st Cir. 1970) 6
Yates v. *United States*, 404 F.2d 462 (1st Cir. 1968) ... 6

Statutes

18 U.S.C. § 2 4
§ 891(7) 2
§ 894 3
28 U.S.C. § 1254(1) 1

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Opinion of the Court Below

The Opinion and Judgment of the United States Court of Appeals for the First Circuit entered on March 19, 1976 is unreported. A copy is attached as Appendix A hereto.

Jurisdiction

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254(1).

Questions Presented

I. Is the prosecution defective of an indictment that charged the defendant in a conspiracy count with having conspired with ". . . various other persons whose names are known and unknown to the Grand Jury". The fundamental requirement of an indictment is to furnish an accused with such description of the charge so as to enable him (1) to prepare his defense, (2) to protect him against double jeopardy, and (3) to inform the Court of the facts alleged so that it may decide if they are sufficient in law to support a conviction.

II. The danger inherent in combining in one prosecution a conspiracy count with substantive counts that essentially are offenses no more than the objects of the conspiracy.

III. Should a mistrial have been granted after jurors had read a newspaper article in the jury room that associated the defendant with well publicized organized crime figures. The news source of the article carried into the jury room had been a Special United States Attorney who had presented the instant case to the Grand Jury returning this indictment.

Federal Statutes Involved

18 U.S.C. § 891(7)

An extortionate means is any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person.

18 U.S.C. § 894. Collections of extensions of credit by extortionate means

(a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means

(1) to collect or attempt to collect any extension of credit, or

(2) to punish any person for the nonrepayment thereof, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, for the purpose of showing an implicit threat as a means of collection, evidence may be introduced tending to show that one or more extensions of credit by the creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means or that the nonrepayment thereof was punished by extortionate means.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence, at the time the extension of credit in question was made, of the circumstances described in section 892(b)(1) or the circumstances described in section 892(b)(2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing that words or other means of communication, shown to have been employed as a means of collection, in fact carried an express or implicit threat, the court may in its discretion allow evidence to be introduced tending to show the reputation of the defendant in any community of which the person against whom the alleged threat was made was a member at the time of the collection or attempt at collection.

18 U.S.C. § 2. Principals.

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Statement of the Case

This is a petition seeking review of judgment of the Court of Appeals for the First Circuit affirming judgment of conviction of the United States District Court for the District of Massachusetts.

On August 19, 1975 a grand jury sitting in the United States District Court for the District of Massachusetts returned a six-count indictment charging the defendant and four others with conspiracy to violate Section 891(7) of Title 18, U.S.C. (Count I) and substantively violating the same section (Counts II through VI) by threatening the use of violence to collect an extension of credit. The indictment also recited, in Count I, that one Michael Pellicci and Regina Pellicci were named as co-conspirators but were unindicted and that the defendants had conspired with ". . . various other persons whose names are known and unknown to the Grand Jury".

The trial commenced on September 9, 1975. On September 10, 1975 the four co-defendants pled guilty to various counts of the indictment. On September 13, 1975 the defendant was found guilty on two counts of the indictment and on October 7, 1975 was sentenced to serve a total of eight years in prison and to pay a fine of $10,000.00.

Statement of Facts

The facts relevant to each of the questions presented are related in the text of the arguments for each question.

Argument for Allowance of the Writ

The reasons proposed by the petitioner for granting the writ will be stated under each of the headings relating to the respective questions presented.

I. Is the Prosecution Defective of an Indictment That Charged the Defendant in a Conspiracy Count With Having Conspired With ". . . Various Other Persons Whose Names Are Known and Unknown to the Grand Jury". The Fundamental Requirement of an Indictment Is to Furnish an Accused With Such Description of the Charge So as to Enable Him (1) To Prepare His Defense, (2) To Protect Him Against Double Jeopardy, and (3) to Inform the Court of the Facts Alleged So That It May Decide If They Are Sufficient in Law to Support a Conviction.

There is a long line of cases that are consistent in declaring that the fundamental requirement of an indictment is to furnish an accused with such description of the charge so as to enable him (1) to prepare his defense, (2) to protect him against double jeopardy, and (3) to inform the Court of the facts alleged so that it may decide if they are sufficient in law to support a conviction. *Russell* v. *United States,* 369 U.S. 749, 82 S. Ct. 1038, 8 L.Ed.2d 240 (1962); *Hagner* v. *United States,* 285 U.S. 427, 52 S.Ct. 417, 76 L.Ed. 861 (1932); *United States* v. *Addonizio,* 451 F.2d 49 (3rd Cir. 1972); *Anderson* v. *United States,* 262 F.2d 764

(8thCir. 1959); *United States* v. *Lamont,* 236 F.2d 312 (2nd Cir. 1956); *Yates* v. *United States,* 404 F.2d 462 (1st Cir. 1968); *United States* v. *Tomasetta,* 429 F.2d 978 (1st Cir. 1970).

The issue was more clearly framed when in argument in support of the motion the defendant complained about the grand jury reporting out that ". . . there were various other persons who were part of this conspiracy, whose names or identities are unknown to them when, in fact, there is no such evidence, nor does the government intend to introduce such evidence. I say this is prejudicial to this defendant and can only confuse a jury . . . that because the government has alleged it that in some vague, uncertain and conjectural way there are other people involved here . . ."

Speaking more directly to the point, the defendant does not complain that it is necessary for all conspirators to be named in order for an indictment to be sufficient. See *Rogers* v. *United States,* 340 U.S. 367, 71 S. Ct. 438 (1950); *United States* v. *Green,* 421 F.2d 1237 (2nd Cir. 1970); *United States* v. *Falco,* 496 F.2d 1359 (1974). It is the contention rather that the deficiency in the instant case compares favorably with that considered by this Court in *United States* v. *Tomasetta,* 429 F.2d 978 (1970). In *Tomasetta,* this Court described the indictment as accusing the defendant ". . . of making threats by an unstated means to an unnamed person on a particular day in a city of moderate size . . ." At P. 979. Noting that the crime charged was "essentially a speaking offense . . ." the Court observed that it would be extremely difficult for the defendant to fix in his mind the substance of any conversation ". . . where the location, time and object of the communication are specified only in the most general terms or not at all, . . ." At P. 980.

II. The Danger Inherent in Combining in One Prosecution a Conspiracy Count With Substantive Counts That Essentially Are Offenses No More Than the Objects of the Conspiracy.

The practice of combining a conspiracy count together with substantive counts in an indictment is one of long standing and apparent unanimous approval. All of the courts that have considered this matter, we suggest, have been too quick to approve of this practice on the basis of the conspiracy charge being separate and distinct from the substantive counts in spite of the fact that, as in the instant case, for all practical purposes the proof required and offered was identical. This record like many before it is replete with evidence of conversations between persons other than the defendant, not in his presence and in a time frame existing long before the alleged commission of the conspiracy that in no way, by the stretch of no rule of evidence, could have been permitted against the defendant in support of a substantive count standing alone.

III. Should a Mistrial Have Been Granted After Jurors Had Read a Newspaper Article in a Jury Room That Associated the Defendant With Well Publicized Organized Crime Figures. The News Source of the Article Carried into the Jury Room Had Been a Special United States Attorney Who Had Presented the Instant Case to the Grand Jury Returning This Indictment.

On the second day of trial, September 10, 1975, each of the four co-defendants pled guilty to two counts of the indictment. On September 11, one of the two major newspapers in the Boston — Massachusetts area heralded the plea with the headline-type declaration that "Four Boston-

area men pled guilty to loansharking charges". The article made note of the fact that the fifth man, ". . . William 'Slim' Kazonis, 39, of Billerica Street, remains on trial". The article combined highlights of the trial up until that point together with information that by its terms had been furnished by ". . . the prosecutor in the case, Joel Friedman" and recounted the arrest of Michael Pellicci in January, 1974 and Friedman's reference to Pellicci as a "hardened professional criminal, who was directly supervised by Gennaro Angiulo" and noted that Pellicci had been sentenced "to a federal penitentiary". At the trial of the instant case the government had successfully established that Pellicci was the lender of the pertinent usurious loans and that the defendant, after Pellicci had been sentenced to prison, visited with him on some thirteen separate occasions. Any vestige of doubt between the connection of the defendant and Pellicci was removed by the prosecutor during the course of his summation. ". . . It was William Kazonis, because William Kazonis is the man who would receive the responsibility for collecting that loan. He was the man that Janjigian worked for, that Femino worked for and Patrizzi worked for, and Sarkesian. William Kazonis was the man who was responsible for the collection of the loans of Michael Pellicci . . . ." We have, therefore, the trial prosecutor establishing a connection between the defendant and Pellicci and the prosecutor who obtained the indictment, Joel Friedman, establishing off the record the connection between Pellicci and Gennaro Angiulo.[1]

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[1] Cumulative publicity throughout the years concerning Mr. Angiulo has firmly established in the minds of the public his notoriety as the alleged head of the Boston underworld, to a point, as will shortly be seen, that even the events surrounding Mr. Angiulo's mother's funeral received headline attention from the Boston newspapers shortly prior to this trial.

Many of the jurors lived outside the Boston area, but unfortunately the trial court's hope that only "no more than one or two" had read the article was quickly dispersed when upon inquiry it appeared that all of the jurors had read the article. At a voir dire of jurors requested by defense counsel it appeared that one of the jurors had brought the newspaper article into the jury room. Some of the jurors' answers during the voir dire shed illumination both as to the exposure of prejudice and the jurors' hesitancy in acknowledging familiarity with its contents and attendant implications.

Conceding the fact that a trial judge has a large discretion on ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial, *Holt* v. *United States,* 218 U.S. 245, 251, 31 S. Ct. 2, 6, 54 L. Ed. 1021, we nonetheless suggest that such a generalization cannot extend to glossing over the severe prejudice herein demonstrated.

On a similar record, in *Marshall* v. *United States,* 360 U.S. 310, 79 S. Ct. 1171, and referring to ". . . the exposure of jurors to information of a character which . . . was so prejudicial it could not be directly offered as evidence, the prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is part of the prosecution's evidence. Cf. *Michaelson* v. *United States* . . . It may indeed be greater for it is more than tempered by protective procedures." 360 U.S. at pp. 312, 313.

In *Gorin* v. *United States,* 313 F.2d 641 (1st Cir. 1963) in a case involving relatively minor publicity not of the nature to ". . . vilify or heap opprobrium on the appellants" this Court indicated its disapproval of ". . . pretrial publicity, particularly when it emanates from prosecuting officials." At p. 645.

In the instant case the source of the publicity complained of was from the very attorney who had secured the indictment. When Mr. Friedman took it upon himself to speak to the press concerning Mr. Pellicci,[2] it is inconceivable to conclude that he did not expect the press to exploit his remarks at times best suited to sell as many papers as possible. It is also more than just interesting to note that Mr. Angiulo's name has become such a household word that the news media no longer has to describe who he is but merely to mention his name.

More recently, in *United States* v. *Concepcion Cueto,* 515 F.2d 160 (1975), this Court reversed a conviction based upon prejudicial publicity that similary arose during the course of the defendant's trial. Even though the voir dire of the jurors indicated that they all could be "fair and impartial", this Court, recognizing the capacity for prejudice in jurors being ". . . exposed to this disturbing information at a crucial moment, immediately prior to closing arguments and shortly before they began their deliberations." At p. 164.

> "In the circumstances we do not think the jurors' assurance of continued impartiality nullify appellant's claim of prejudice. Had the potential harm been less clear, the individual assurances might have been very useful in assessing actual impact. (citations omitted) But a juror's impressions, however honest, cannot be dispositive where the improper information is as damning and material as this. (citations omitted). A criminal defendant's guilt is not to be determined from inadmissible evidence. . . ."
>
> *Concepcion Cueto* at p. 164.

[2] It should also be noted that Mr. Friedman was the Special Attorney who prosecuted and obtained the conviction against Mr. Pellicci, 504 F.2d 1106 (1st Cir., 1974).

In the instant case, unlike *Concepcion Cueto,* the trial judge after the voir dire did admonish the jurors concerning the effect upon them of news articles but it would be a charade, we suggest, to conclude that such instructions could effectively outweigh the damnation contained in an article sponsored by the prosecution. This is far from the ". . . marginal case" that could help to remedy and confine the prejudice.

At the completion of the voir dire the trial judge concluded that he was satisfied the jurors had ". . . paid attention to my instructions in this regard . . ." It is difficult to square this conclusion with the fact that every juror except Mrs. Gnecco[3] had deliberately satiated his curiosity by reading the article and/or discussing it in varying degrees.

The seeds of this prejudice were sown by a government prosecutor. It is importune for another government attorney to now claim that the growth of that prejudice and its coming to flower at the most critical time of the progress of this case was a matter beyond its control. The voir dire and the Court's subsequent cautionary instructions cannot seriously be considered as an adequate antidote. At best, the voir dire can only serve to give a faint glimpse of the damage done. At its worst it fans the jurors' curiosity and by its nature points attention to the very matters we all would hope that jurors would ignore. The dilemma this defendant was faced with was neither unavoidable nor happenstance. It was a creature of government indiscretion and warranted a mistrial.

[3] Mrs. Gnecco testified that when she read the headline, she pushed the paper away and said, "We're not supposed to read it."

Conclusion

We submit that these issues will continue to present themselves in the future. *Certiorari* should be granted because this case affords a rare opportunity to give some uniformity to a most important objective of judicial objectivity.

Respectfully submitted,

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APPENDIX

NOT FOR PUBLICATION

United States Court of Appeals
For the First Circuit

No. 75-1396

UNITED STATES OF AMERICA,
APPELLEE,
v.
WILLIAM KAZONIS,
DEFENDANT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Walter Jay Skinner, *U. S. District Judge*]

Before COFFIN, *Chief Judge*,
MCENTEE AND CAMPBELL, *Circuit Judges*.

Joseph J. Balliro for appellant.
William G. Otis, Attorney, Department of Justice, with whom *James N. Gabriel*, United States Attorney, *Martin D. Boudreau*, Special Attorney, Department of Justice, and *Sidney M. Glazer*, Attorney, Department of Justice, were on brief, for appellee.

March 19, 1976

COFFIN, *Chief Judge*. Appellant was convicted on one count of participation in the collection, or attempt to collect, an extension of credit by extortionate means, and on one count of conspiracy under the same statute, 18 U.S.C. § 894. He raises several arguments on appeal.

1. Appellant first argues that we should reconsider our decision in *United States* v. *Pellicci*, 504 F.2d 1106 (1st

Cir. 1974), that a designation by Acting Attorney General Bork authorizing "the Assistant Attorney General in charge of the Criminal Division to approve electronic interceptions conforms to 18 U.S.C. § 2516(1). However, Title III does not even apply to situations where, as here, one party to the conversation has consented in advance. 18 U.S.C. § 2511(2)(c).

2. Appellant's argument that the Special United States Attorney lacked legal authority to return the indictment, and that it was invalid without the signature of a local United States Attorney, was recently rejected in *United States* v. *Morrison,* —— F.2d —— (1st Cir., Mar. 15, 1976).

3. Appellant argues that it was improper to charge a conspiracy between the co-defendants and "various other persons whose names are known and unknown to the grand jury". The relevant standards are set forth in F. R. Crim. P. Rule 7(c): "The indictment . . . shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged". Appellant recognizes that there is no need for each conspirator to be named, *Rogers* v. *United States,* 340 U.S. 367, 375 (1951), but nonetheless says that he had no way of preparing a defense to the conspiracy charge because it included "various other persons known and unknown".

The contention is frivolous on this record. The indictment charged the five co-defendants in five counts of participation in the collection, or attempt to collect, extortionate extensions of credit, and one count of conspiracy to do so. All of the counts related to the same individual (who was named, *cf. United States* v. *Tomasetta,* 429 F.2d 978 (1st Cir. 1970)), and the same extension of credit. The alleged lenders were named as unindicted co-conspirators. The five substantive counts, as well as ten overt acts listed in the conspiracy count, detailed the

dates and places on which the co-defendants were alleged to have attempted the collections. Moreover, the proof at trial was concerned almost exclusively with those named in the indictment; there were some hazy references by the conspirators to the possible involvement of others, but the overwhelming bulk of the evidence concerned the circumstances surrounding the grant of the loan and the specific attempts of collection by the defendants themselves. This case demonstrates vividly that the use of the phrase "various other persons whose names are known and unknown to the grand jury" is not a per se frustration of the purposes of Rule 7 — to inform the court of the sufficiency of the charge to support a conviction; to allow the court to consider the applicability of double jeopardy; and primarily to "inform the defendant of the nature of the accusation against him". *Russell* v. *United States,* 369 U.S. 749, 767 (1962). We note that the request for a bill of particulars did not seek even the names of the "known" co-conspirators.

4. Appellant says that the combination of a conspiracy count with several substantive counts which were the alleged objects of the conspiracy, admittedly a practice "of long standing and apparent unanimous approval", was unfair in his particular circumstances. In support of this claim he points only to a jury question indicating some confusion as to how to separate the conspiracy from the substantive counts. However, the court re-instructed on this point, and, indeed, the jury acquitted on two of the substantive counts. We see no unfairness warranting departure from the settled rule. *See United States* v. *Boyle,* 338 F. Supp. 1028, 1034-35 (D. D.C. 1972).

5. Appellant objects to a reference in the prosecutor's opening statement mentioning another alleged extortionate loan transaction involving co-defendant Sarkesian, and to the government's subsequent failure to produce evidence

of this transaction. No evidence was produced because Sarkesian pleaded guilty on the second day of trial. The evidence would have been at least arguably relevant to Sarkesian's activities in connection with the collections charged in the indictment, and to the alleged conspiracy with appellant. The court had instructed the jury that opening and closing statements are not evidence, and the prosecutor had repeated that at the start of his statement. Viewed in the context of a five-day trial, it is unlikely that the reference could have prejudiced the appellant, especially when it is remembered that the jury acquitted on the two substantive counts in which presence at the collection scene, but no active participation by the appellant, was alleged.

6. Error is also alleged in the admission of two statements made by unindicted co-conspirator Michael Pellicci to the victim of the conspiracy. Appellant charges that these statements (in which Pellicci told the victim not to worry about testifying before the grand jury, and in which Pellicci said, "Yes, that's the fat guy, the stool pigeon. We'll take care of him later on.") were hearsay improperly admitted without independent evidence that Pellicci was indeed a co-conspirator. We believe, however, that there was ample independent evidence of Pellicci's involvement in the conspiracy charged.* We note that throughout this phase of the testimony the court repeatedly gave the instructions required by *United States* v. *Honneus,* 508 F.2d 566 (1st Cir. 1974), to the effect that the jury should

*The evidence included the victim's testimony that Pellicci had made the usurious loans; testimony that Kazonis had visited Pellicci numerous times after the latter was imprisoned; and admissions of various co-defendants that they were collecting Pellicci's account, including a statement apparently by appellant, clearly referring to Pellicci although not by name, to the effect that he was in prison and needed the money for lawyers and his family.

not consider Pellicci's statements unless independent evidence existed of a common enterprise between Pellicci and the defendants, and that the conversation took place during the pendency of and in furtherance of the conspiracy. Furthermore, it is hard to see what prejudice resulted from the first statement; and both were admissible as non-hearsay—not for the truth of the matters asserted, but for the fact that they were made. As such, they were admissible simply on a showing of relevance. *Anderson* v. *United States,* 417 U.S. 211, 221 (1974).

7. Objection is made to the admission of the tapes of two conversations, recorded by a body recorder on the victim during two of the collection efforts. On one tape, the victim spoke with co-defendant Janjigian; and on the other, he talked with co-defendants Patrizzi and Kazonis. The appellant argues that a proper foundation was not set and that the jury would confuse the voices of Patrizzi and appellant. (It was conceded that the victim's foreign accent made his voice readily identifiable.)

There was no error in the introduction of these tapes. A proper foundation was laid and the tapes were corroborative of conversations to which the victim-witness had already testified. The government had offered transcripts identifying the voices, but did not press the offer after defendant objected. While portions of the tapes were inaudible, the bulk of them were intelligible and the court found them, especially in light of the victim's earlier evidence attributing various specific statements to the various co-defendants, of "clear and probative value because of the general detail and the flavor of it that could not be conveyed to the jury in any other way". The tapes were properly admitted within the judge's discretion under the standards of *Gorin* v. *United States,* 313 F.2d 641, 651-52 (1st Cir. 1963). While proper practice would have the judge listen to the tape first out of the presence of

the jury to determine its accuracy and audibility, and to rule on any objections before the jury heard the recording, this in itself is not ground for reversal, in view of the ultimate admissibility and resulting lack of prejudice. *See United States* v. *Bryant,* 480 F.2d 785 (2d Cir. 1973).

8. Appellant claims prejudice from a newspaper article which appeared during the trial, reporting the guilty pleas of appellant's four co-defendants. A small paragraph in the middle of this article contained a statement that defendant was a "hardened professional criminal who was directly supervised by Gennaro Angiulo". Appellant informs us that "cumulative publicity throughout the years concerning Mr. Angiulo has firmly established in the minds of the public his notoriety as the alleged head of the Boston underworld".

The statement was attributed to the Strike Force attorney who had prosecuted Pellicci. While we have disapproved of publicity which "emanates from prosecuting officials", *Gorin* v. *United States,* 313 F.2d 641 (1st Cir. 1963), the statement here had been made a year and a half earlier, indeed prior to the crimes alleged in the indictment. It clearly was not intended to affect this trial, and we cannot fault the prosecution for its current appearance.

The court held interviews with the jurors individually as recommended in *Patriarca* v. *United States,* 422 F.2d 314 (1st Cir. 1968). Quite a few jurors admitted reading at least part of the article, and several had discussed it in the jury room; however, the testimony was that the discussion concerned how the guilty pleas of the co-defendants would reduce their workload in the case. Very little attention appears to have been paid to the paragraph in question. Only three jurors, two of them alternates who did not participate in the deliberations, evidenced any awareness of Angiulo's purported reputation; the juror who sat in on deliberations had thought only that he had

read of Angiulo in connection with gambling. The court declared itself satisfied that the jurors could render an impartial verdict and gave strong cautionary instructions.

Clearly the court acted within its discretion. *Holt* v. *United States,* 218 U.S. 245, 251 (1910). The offending information was buried in the article. It spoke not to defendant's having committed any crime but to an association of a named co-conspirator. This concededly had the potential to prejudice. But, absent exacerbating factors, this is the kind of fortuitous slip which jurors, given adequate and timely curative instructions, have demonstrated their capacity to ignore. We conclude that this article did not adversely affect appellant. *See United States* v. *Solomon,* 442 F.2d 110, 1117-19 (7th Cir. 1970), and cases discussed therein.

Affirmed.